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July 13, 2005

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Our File No. 20939-0100-60

VIA HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

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JUL 13 2005

Federal Communications Commission
Office of Secretary

Re: **Reply to Opposition to Petition for Reconsideration**
Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Evergreen, Alabama and Shalimar, Florida)
MB Docket No. 04-219
RM-10986

Dear Ms. Dortch:

Transmitted herewith on behalf of Qantum of Ft. Walton Beach License Company, LLC, are an original and four copies of its Reply to Opposition to Petition for Reconsideration in the above-referenced matter.

If there are any questions concerning this submission, please contact the undersigned directly.

Sincerely,

John M. Pelkey

Enclosures
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Before the
Federal Communications Commission
Washington, D.C. 20054

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**Federal Communications Commission
Office of Secretary**

In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 04-219
Table of Allotments) RM-10986
FM Broadcast Stations)
(Evergreen, Alabama and Shalimar, Florida))

To: Office of the Secretary

Attention: Assistant Chief, Audio Division
Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Quantum of Ft. Walton Beach License Company, LLC ("Quantum"), through counsel, hereby replies to the Opposition filed by Star Broadcasting, Inc. ("Star"), with respect to the Petition for Reconsideration filed by Quantum in response to the *Report and Order*¹ issued by the Commission staff in the above-captioned proceeding. As will be shown below, the Opposition simply fails to come to grips with the fact that the staff's action in reallocating Channel 227 from Evergreen, Alabama, to Shalimar, Florida, withdraws service from more than 97,000 people, creates a new underserved population of more than 9,000 people and fails to achieve a preferential arrangement of allotments inasmuch as it does not provide a first local service to Shalimar, but in fact simply adds yet one more reception service to the already well-served Fort

¹ *Evergreen, Alabama, and Shalimar, Florida*, (MB Docket No. 04-219), *Report & Order*, 20 FCC Rcd. 6300 (MB, 2005).

Walton Beach Urbanized Area. In addition, the Opposition fails to even discuss the fact that the staff's decision in this proceeding has caused the Commission to become an unwitting participant in the violation of the Commission's ownership rules by Cumulus Media, Inc. ("Cumulus"). Finally, although the Opposition seeks to deflect Quantum's demonstration that the staff's action reallocating Channel 227 to Shalimar will cause the Commission to be an unwitting force behind Cumulus's attempt to increase its stranglehold on the Fort Walton Beach market, the fact remains that Cumulus's attempt to further monopolize the market actually acts as further evidence that Shalimar is an integral part of the Fort Walton Beach Urbanized Area. As a result, Quantum's Petition for Reconsideration must be granted.

- I. The Adoption of the *Report and Order* in this Proceeding Results in the Withdrawal of Service from Close to 100,000 People, Nearly a Tenth of Whom will Receive Fewer than Five Full-time Services, and the Commission has Failed to Provide any Justification for such a Withdrawal.

Included with Quantum's Comments in opposition to the *Notice of Proposed Rule Making*² issued by the Commission in this proceeding was an engineering statement prepared by Graham Brock, Inc., which conclusively demonstrated that the proposed allocation to Shalimar would withdraw service from 97,195 people and that, of these, 9,062 people (i.e., nearly 10%) would receive fewer than five full-time services if the proposal were adopted. The *Report and Order* makes no claims concerning the number of people who would lose service as a result of the Commission's action withdrawing Evergreen's only FM service, but merely asserts that the Commission's own analysis reveals that 1,400 people would receive only four aural services as a result of the Commission's action. In reaching this conclusion, the *Report and Order* provides absolutely no explanation setting forth the reason for the staff's rejection of the Graham Brock

² *Evergreen, Alabama, and Shalimar, Florida*, 19 FCC Rcd 10208 (MB 2004).

analysis. No engineering statement is provided by the Commission. No coverage maps are provided by the Commission. No critique of the Graham Brock engineering report is provided. Instead, the Commission does no more than make an assertion of fact that is based upon no analysis that it has made available to the public. This rule making is thus fundamentally flawed and Star's Opposition does not even attempt to provide any justification for this flaw.

The withdrawal of service from 97,000 people and the creation of an underserved population of 9,000 people is directly contrary to the public interest. As Qantum, relying upon *West Michigan Telecasters, Inc.*, and *Triangle Publications, Inc.*,³ pointed out in its Petition for Reconsideration, the Commission has consistently held that losses in service area are prima facie inconsistent with the public interest and require a strong showing of countervailing factors.⁴ In this case, there simply are no countervailing factors supporting a claim that the withdrawal of Evergreen's sole FM service is necessary in order to permit the Fort Walton Beach market to receive its 18th service.

In response, Star argues that Qantum's reliance upon *West Michigan Telecasters, Inc.*, and *Triangle Publications, Inc.*, is misplaced because those two cases dealt with situations in which the proponent was seeking a waiver of the Commission's rules and because *West Michigan Telecasters* and *Triangle Publications* are cases involving television stations. According to Star, the Commission's FM allocations procedures "do not give any weight to third, fourth or fifth services."⁵

Star's attempt to so distinguish *West Michigan Telecasters* and *Triangle Publications* is futile. The point being made by the Commission in *West Michigan Telecasters* is that a

³ *West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc.*, 460 F. 2d 883 (D.C. Cir. 1972); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964).

⁴ See Petition for Reconsideration at n.6.

⁵ See Opposition to Petition for Reconsideration at 5.

withdrawal of service is contrary to the public interest. The Commission made no distinction in *West Michigan Telecasters* between withdrawals of service by TV stations and withdrawals of service by FM stations. Moreover, in claiming that, in FM proceedings, the Commission gives no weight to third, fourth or fifth services, Star is simply wrong. The *Report and Order* in this very rule making explains that the Commission has considered five or more reception services to be “abundant” and cites two different Commission decisions supporting that proposition of law. In fact, the Commission, in assessing the proposal to reallocate Channel 227 from Evergreen to Shalimar, actually acknowledges that 1,400 persons will receive “only four aural services.” If, as Star now asserts, *West Michigan Telecasters* and *Triangle Publication* were in any way inapposite, there would have been no need for the Commission to have determined how many persons would no longer receive service from five or more radio stations.

Rather than trying to argue that a withdrawal of service is in the public interest, Star would have been better advised to have tried to explain the Commission’s failure to justify its decision to permit at least 1,400 persons to no longer receive service from the five or more stations that the Commission considers necessary for service to be considered to be “abundant.” Star did not even attempt to provide such a justification, however. The reason for this omission is obvious. There can be no justification for permitting the withdrawal of FM service from Evergreen so that Fort Walton Beach can receive an 18th service.

II. Star Misperceives Qantum's Argument with Respect to the Commission's Application of Tuck in this Case.

Star also claims that Qantum's Petition for Reconsideration comes 17 years too late inasmuch as, in Star's view, Qantum's Petition for Reconsideration is "an attack on the *Tuck* doctrine, itself."⁶ Star simply misses the point of Qantum's Petition for Reconsideration.

Qantum explained in its Petition for Reconsideration that, at the time that the Commission adopted the decision permitting licensees to seek changes in their community of license, the Commission assured the public that it would vigilantly guard against abuses whereby licensees relocated stations from rural areas to well-served larger metropolitan areas and, in the process, deprived listeners of service.⁷ The decision in *Faye and Richard Tuck*⁸ was intended by the Commission to act as a bulwark against such abuse. Unfortunately, however, it has become a truism that the Commission seldom observes its own holding in *Tuck*, with the result that the public is now being disserved. Qantum demonstrated that a majority of the *Tuck* factors demonstrate that Shalimar is not independent of the Fort Walton Beach urbanized area. In fact, a dispassionate application of the *Tuck* factors compels the conclusion that the reallocation of Channel 227 to Shalimar is precisely the type of abuse of the Commission's *Change of Community MO&O* that *Tuck* was designed to prevent. It is not necessarily *Tuck*, but the Commission's application of *Tuck*, that is the problem. In fact, Star's lengthy reiteration of those *Tuck* factors that, in Star's view, support a reallocation of Channel 227 to Shalimar, only serves to highlight the fact that *Tuck* has been turned into a sham.⁹ Those factors, as defined by Star,

⁶ Opposition to Petition for Reconsideration at 5.

⁷ See Petition for Reconsideration at 3, citing *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd. 4870 (1989), *recon. granted in part*, 5 FCC Rcd. 7094 (1990) ("*Change of Community MO&O*").

⁸ 3 FCC Rcd. 5374 (1988).

⁹ Star claims that local government is more important than the other *Tuck* factors. That simply is not true. In the *Detroit Lakes* decision upon which Star relies, the Commission determined that a local government of at least 33 residents, including an elected mayor and a six member city council in addition to an administrative staff, indicated

are basically no different than the factors used by the Commission to determine whether the situs of a proposed allocation is a community. While that is an assessment that must be made if the Commission is to properly apply Section 307(b) of the Communications Act, it is a necessary, but not *sufficient*, exercise for purposes of determining whether Shalimar is independent from the Fort Walton Beach Urbanized Area. The question of whether Shalimar is interdependent with the Fort Walton Beach Urbanized Area is a question that is separate and distinct from the question of whether Shalimar is a community. Unfortunately, the Commission's application of the *Tuck* factors in this case glosses over this crucial distinction.

To even argue that Shalimar is not interdependent with the Fort Walton Beach Urbanized Area is to blink reality. Shalimar is entirely located within the Fort Walton Beach Urbanized Area. It is only three miles from Fort Walton Beach proper. It has only 718 residents, as compared to Fort Walton Beach's 152,741 people. Its residents' phone listings are placed in the Fort Walton Beach phone book. It relies on other governments in the Fort Walton Beach Urbanized Area for numerous municipal services. The high school attended by Shalimar students is located in Fort Walton Beach. It has no library. Although Shalimar has a police department, the Shalimar police force encourages residents to leave a voicemail message when no one is available or to call the Okaloosa County's sheriff dispatcher, which then dispatches Okaloosa County, not Shalimar, police. Shalimar does not contain a location to register an automobile or to obtain a driver's license. There is no voter registration office in Shalimar.

the independence of Barnesville from the Fargo-Moorhead Urbanized Area located 25 miles away. *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055, 11 (MB 2002). The Commission did not state that this factor was the basis for its determination that Barnesville was an independent community. *Id.* On the contrary, the Commission considered all of the *Tuck* factors and only after looking at all the factors did it determine that Barnesville was independent. Furthermore, comparing a local government that employs 33 local residents to the local government in Shalimar, which boasts only a few part-time elected officials and a small administrative staff, is unrealistic at best. In this case, Shalimar's small local government is no match for the well established local government in Fort Walton Beach a mere 3 miles away. If Shalimar were independent, then it would have a well-established government that provided a broader array of services to its residents.

Water service is provided by the county. Natural gas service is provided by the Okaloosa County gas district. Shalimar has no hotels or motels and tourism is limited to people stopping at the local gas station. Residents seeking hospital services must travel to Fort Walton Beach or Niceville. Shalimar operates no public transportation beyond school buses and the 2000 U.S. Census indicates that only one person uses public transportation to travel to work. During Hurricane Dennis's recent passage through the Fort Walton Beach Urbanized Area, emergency operations were conducted from the Emergency Operations Center, which is located in Shalimar. There simply can be no conclusion but that Shalimar is part and parcel of the Fort Walton Beach Urbanized Area. To reach any other conclusion is to make a mockery of the Commission's commitment, in its *Change of Community M&O*, to stand vigilant against attempts by licensees to abandon rural communities in favor of larger communities. If Shalimar can be viewed to be independent of Fort Walton Beach, virtually any community that is found to be a community for Section 307(b) purposes must inevitably be found to be independent of the urbanized area within which it is located.¹⁰

III. The Commission must Consider the Effect of the *Report and Order* on Cumulus's Compliance with the Commission's Ownership Rules.

Star also argues in its Opposition that the Commission should not consider the effects of the proposed allocation on its licensees' compliance with the Commission's ownership rules.

Again, Star misses the point.

As an initial matter, it must be pointed out that Star has simply glossed over the fact that, as Quantum explained in its Petition for Reconsideration, Cumulus presently holds more than 33%

¹⁰ It is important to stress that Quantum is not contending that the residents of Shalimar are not entitled to radio service. Quite to the contrary, those residents are not only entitled to receive radio service, but they are already receiving radio service inasmuch as they, along with the other residents of the Fort Walton Beach Urbanized Area, are receiving radio service from some 17 stations located in the Fort Walton Beach Urbanized Area.

of the total debt plus equity in Star, which is the licensee of WPGG(FM), the station that is the beneficiary of the Commission's decision to reallocate Channel 227 to Shalimar. Because the reallocation of Channel 227 from Evergreen to the Fort Walton Beach market became effective as of May 9, 2005, Cumulus currently holds attributable interests in five FM stations in the Fort Walton Beach market. Because there are now only 18 stations, including WPGG(FM), in the Fort Walton Beach market, Cumulus can hold an attributable interest in no more than four same-service stations in that market. The one way to remedy Cumulus's non-compliance with the Commission's ownership rules is to grant Quantum's Petition for Reconsideration and return WPGG(FM) to Evergreen. That action will have the effect of placing Cumulus into compliance with the numerical limits imposed by the Commission's ownership rules.

Rather than dealing with Cumulus's current violation of the ownership rules, Star deals in its Petition for Reconsideration only with Cumulus's future compliance with the ownership rules and argues that Quantum should limit its arguments concerning Cumulus's stranglehold of the Fort Walton Beach market to the various applications in which Cumulus has sought to become the licensee of WPGG(FM) and WTKE(FM). In making this argument, however, Star not only remains mute with respect to Cumulus's current non-compliance with the rules, but it also ignores the fact that, in its application seeking to modify the WPGG(FM) facilities so as to relocate them to Fort Walton Beach (BPH-20050513ACW), Star never once acknowledges that WPGG(FM) is in the process of being sold to Cumulus, thus preventing the Commission staff processing the facilities modification application from making the necessary assessment of Cumulus's compliance with the Commission's ownership rules.

In any event, Star's argument misses an essential aspect of the point raised by Quantum in its Petition for Reconsideration. The reason why Cumulus is seeking to swap WPGG(FM) for

WNCV(FM) is because Cumulus is attempting to turn WPGG(FM) into a Fort Walton Beach station. WPGG(FM) will become part of Cumulus's Fort Walton Beach cluster. The operating agreements for WNCV(FM), the programming for WNCV(FM), and the on-air staff for WNCV(FM) will simply be transferred over to WPGG(FM), with WPGG(FM) operating from a transmitter site in Fort Walton Beach. There can be no clearer evidence that the reallocation of Channel 227 to Shalimar is, in fact, a reallocation of the channel from Evergreen to Fort Walton Beach. Thus, Star's pending assignment and facilities modification applications serve to conclusively undercut the *Report and Order's* determination that Evergreen and its environs should be deprived of service because Shalimar is not interdependent with the Fort Walton Beach Urbanized Area.

Moreover, especially given Star's failure to even acknowledge its planned sale to Cumulus in the facilities modification application whereby it seeks authority to construct the WPGG(FM) facilities in Fort Walton Beach, the Commission must consider the anticompetitive effects of the *Report and Order*. This allocation proceeding is part and parcel of Cumulus's efforts to increase its hold on the Fort Walton Beach market. Without the *Report and Order*, Cumulus, a licensee with a 70 percent market share and an unduplicated share in excess of 57%, would be unable to expand its stranglehold on the Fort Walton Beach market by swapping its two lowest-powered FM facilities for facilities that are among the highest-powered FM stations in the market and then, through contractual provisions that it has imposed on Star, be ensured that the stations that are being assigned to Star would be significantly hampered in their ability to effectively compete with Cumulus. The inextricable entanglement of this rule making proceeding with the various Star applications leads to a situation in which the Commission must

consider the effect of the *Report and Order* on competition in the Fort Walton Beach market if the public interest is to be served.

Conclusion

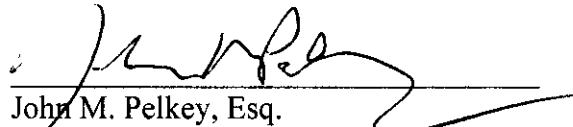
The *Report and Order*'s decision to reallocate Channel 227 from Evergreen, Alabama, to the Fort Walton Beach market must be reversed. The *Report and Order*'s decision to reallocate Channel 227 has resulted in the well-served market of Fort Walton Beach gaining an unneeded additional FM station, while service will be withdrawn from nearly 100,000 people, the residents of Evergreen will lose their only FM station and more than 9,000 people will begin receiving fewer than five full-time services. Thus, unless the Commission reverses the *Report and Order*, it will find itself faced with precisely the kind of abandonment of rural areas that it sought to avoid at the time that it adopted the *Change of Community MO&O*. Moreover, while there can be situations in which such a withdrawal of service can be justified by countervailing public interest factors, just the reverse is true in the present case inasmuch as permitting the *Report and Order* to remain in effect would allow Cumulus to retain its present unlawful interest in Star and would result in Cumulus being able to increase its monopoly hold on the Fort Walton Beach market.

Accordingly, Quantum's Petition for Reconsideration should be granted.

Respectfully submitted,

QANTUM OF FT. WALTON BEACH
LICENSE COMPANY, LLC

By:


John M. Pelkey, Esq.
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1000 Potomac Street, N.W.
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Date: July 13, 2005

CERTIFICATE OF SERVICE

I, Yvette J. Graves, an employee of Garvey Schubert Barer, hereby certify that I have on this 13th day of July, 2005, sent copies of the above "Reply to Opposition to Petition for Reconsideration" by first-class, United States mail, postage prepaid, to the following:

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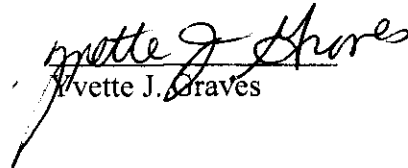
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